IS SPECIFIC JURISDICTION DEAD AND DID WE MURDER IT?

A Cynical Appraisal of the Brussels I Regulation in a Globalising Context

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Abstract

Specific jurisdiction in the EU is in an existential crisis. While its theoretical foundation varies among legal systems, the explanatory model in EU law–established by the Brussels Ia Regulation– is the close geographical connection between a dispute's subject matter and a court. It is believed that the court with such a connection is best positioned to judge the matter. Therefore, Art 7 of the Brussels Ia Regulation allocates jurisdiction over subject matters as broadly defined as contracts and torts to the court of an array of predetermined locations. However, in reality the courts so identified will not always have a close connection to the dispute. Nonetheless, the court of that place has jurisdiction. This contribution will evaluate the legitimacy of denying a more concrete role to the linkage between a forum and a dispute. It will also contrast the current state of play in the EU with the approach taken in the jurisdictional filters featuring in the 2019 Hague Judgments Convention.

1. Introduction

Administering civil justice is not a purely domestic matter. The global and regional integration that have characterized the 20th century brought about an unseen growth of interactions that transcend the borders of states. With it, national justice systems have become increasingly entangled. In an attempt to manage encounters with foreign litigants and judgments, regional organisations and national legislatures have been putting considerable effort in shaping instruments that coordinate (1) the civil jurisdiction of state courts over foreign litigants and (2) the recognition and enforcement ('R&E') of foreign judgments. An important part of the coordination efforts have been conducted through the conclusion of bilateral and multilateral treaties. But on the European stage, the European Union ('EU') has developed into an influential actor who regulates jurisdiction and R&E by enacting regional legislation. Consequently, a uniform regime of jurisdiction,

enforcement and recognition in civil and commercial matters–the Brussels Ia Regulation–is in place in the 27 EU Member States and (as an effect of the EU-UK Withdrawal Agreement)[1] the United Kingdom.[2] The Regulation establishes a generally positively acclaimed regime of quasi-automatic R&E, including a fully harmonised law on the conflict-of-jurisdictions among the courts of the Member States. The latter was deemed necessary to achieve the frictionless R&E of judgments within the EU: receiving states would no longer be tempted to second-guess the jurisdiction of the court where a judgment originated.[3]

Conforming to a long-standing tradition,[4] the Brussels Ia Regulation's foundational rule of jurisdiction is the *actor sequitur rei* rule, whereby jurisdiction is accorded to the courts of the defendant's domicile state (Article 4(1)). Over and above this rule, the Regulation contains grounds of 'special jurisdiction' (or 'specific personal jurisdiction' in US jargon) in Article 7. These grounds exists by grace of a close connection between a dispute and a forum.[5] For this paper, the contract and tort jurisdictions of Article 7 are of relevance.[6] 'In matters relating to a contract', jurisdiction is given to the court of the place of performance. 'In matters relating to tort', jurisdiction is with the court of the place of the harmful event and the damage. These courts are deemed to be particularly fit to judge given their close connection with the respective subject matters of contract and tort.[7]

Despite the Regulation's ambition to allocate jurisdiction to the most appropriately positioned forum, the jurisprudence of the CJEU ('Court of Justice of the European Union') rejected case-by-case considerations of the appropriateness of the forum. If a dispute falls within the category of contract or tort and the claimant opts to rely on the contract or tort jurisdictions, then the aforementioned courts are under the obligation to entertain the dispute, without having the leeway to scrutinize the dispute's connectedness to the forum.[8] At first glance, such an

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[1] Art 67 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7.
[2] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 ('Brussels Ia').
[3] G van Calster, *European Private International Law* (2nd edn, Hart 2016) 22.
[4] AT von Mehren, 'Must Plaintiffs Seek out Defendants - The Contemporary Standing of Actor Sequitur Forum Rei' (1997-1998) 8 King's College Law Journal 23. General personal jurisdiction in the US aches towards the *actor* rule: *Goodyear Dunlop Tires Operations, S.A., v. Brown* 564 U.S. 915 (2011).
[5] Rec 16 Brussels Ia; AT von Mehren and DT Trautman, 'Jurisdiction to Adjudicate: A Suggested Analysis' (1966) 79 HarvLRev 1121, 1146.
[6] Art 7(1)–7(2) Brussels Ia.
[7] Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1979] OJ C59/22.
[8] Case C-288/92 *Custom Made Commercial Ltd v Stawa Metallbau GmbH* ECLI:EU:C:1994:268, para 21; para 78; Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice [1979] OJ C59/97; P Mankowski, 'Art. 7' in U Magnus and P Mankowski (eds), *Brussels Ibis Regulation* (Sellier European Law Publishers 2016) para 2.

obligation flies in the face of the very reason why special jurisdiction exists: to create a convenient, appropriate forum. The inescapable conclusion therefore seems to be that specific jurisdiction is dead, and that we murdered it.

This paper aims to rationalize why special jurisdiction over contracts and torts is as inflexible as it is in the current state of the European law on conflict-of-jurisdictions (section 2.). It will also observe that the origins of the explanation are rooted in the civil law tradition, and contrast with approaches taken in common law systems. Furthermore, it will sketch the consequences of this inflexibility as they played out in the CJEU's jurisprudence. Finally, it will evaluate the European position against the globalization of the law on R&E as embodied in the 2019 Hague Judgments Convention ('the Judgments Convention') (section 3.).[9] The Convention is the most recent instrument that came about under the auspices of the leading platform for the global harmonisation of private international law: the HCCH ('Hague Conference on Private International Law'). It aims to establish a global regime of R&E.[10] Of interest to this paper is the Convention's take on the R&E of judgments concerning contracts and torts. It provides an insightful touchstone for an appraisal of the European standpoint.

Pertinent topics regarding specific jurisdiction this paper will not discuss deserve to be mentioned. The paper will not rerun the discussion about the compatibility of the forum non conveniens test with the Brussels Ia Regulation.[11] It will skip the issue of uniform interpretation of the Judgments Convention (including characterisation),[12] and the use of comparative materials to that aim (including the Brussels Ia Regulation). These topics have been discussed to some extent already, and will undoubtedly trigger more contributions in the future.

2. The Rigid Brussels Ia Regulation Model of Special Jurisdiction over Contracts and Torts

This section will explore why the Brussels Ia Regulation allocates specific jurisdiction over contracts and torts so rigidly. It will sketch a broader perspective by contrasting the European approach to diverging approaches that allow more judicial discretion.

[9] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.
[10] ibid, preamble.
[11] A Dickinson, 'Legal Certainty and the Brussels Convention - Too Much of a Good Thing?' in P de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (Hart 2007) 115.
[12] Eva Jueptner, 'The Hague Jurisdiction Project–what Options for The Hague Conference?' (2020) 16 Journal of Private International Law 247, 258–259; J Ribeiro-Bidaoui, 'The International Obligation of the Uniform and Autonomous Interpretation of Private Law Conventions : Consequences for Domestic Courts and International Organisations' [2020] NILR 139.

2.1. Jurisdictional Allocation without Discretion

The Brussels Ia Regulation's rules of special jurisdiction are characterised by (little to no)[13] discretion. It leaves national judges no room to assess whether they are best placed to judge individual contract or tort disputes, whether another court would be more appropriately positioned, or whether the defendant has a connection to the forum state.[14] This is in contrast with other approaches. Scottish, Northern Irish, and English (but also e.g. Chinese)[15] conflict-of-jurisdictions apply a forum non conveniens test whereby the court verifies whether it is 'the forum in which the case can most suitably be tried *in the interests of the parties* and *for the ends of justice*.'[16] The US law on conflict-of-jurisdictions requires a meaningful connection ('minimum contacts') between the forum and the defendant's conduct or activities (borne out of constitutional Due Process considerations),[17] in addition to applying a forum non conveniens test.[18] Even certain civil law jurisdictions, such as Belgium and Hungary, grant discretion to courts in accepting or declining jurisdiction[19] (even though in general they rely on rigid rules the like of the Brussels Ia Regulation).[20] In contrast to these legal systems, the Brussels Ia Regulation's model of specific jurisdiction allows the claimant freely to choose whether to rely on one of the grounds of specific jurisdiction, or to take proceedings to the defendant's domicile relying on this forum's general jurisdiction. Courts are to defer to the defendant's choice, which in some cases is even described as 'a matter of right'.[21]

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[13] Art 34 Brussels Ia allows the courts of the Member States to decline jurisdiction in favour of a forum in a third country.

[14] A Briggs, *The Conflict of Laws* (Oxford University Press 2019) 94; J Harris, 'Understanding the English Response to the Europeanisation of Private International Law' (2008) 4 JPrivIntlL 347, 352–353.

[15] Art 532 Civil Procedure Law of the People's Republic of China; WONG ChungShing v. Wong Chunho ([2019] Zui Gao Fa Min Zhong No. 592); Z Hao, 'Forum Non Conveniens Applied for the First Time in SPC's Recent Case' (Chinese Justice Observer, 28 July 2020) <https://www.chinajusticeobserver.com/a/forum-non-conveniens-applied-for-the-first-time-in-spcs-recent-case> (accessed 29 July 2020). This is only a recent innovation: H Zhenjie, 'International Jurisdiction of Chinese Courts in Contractual Matters: Rules, Interpretation and Practice' [1999] NILR 204, 223.

[16] J Hill and M Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (Oxford University Press 2016) para 2.155 (emphasis added).

[17] *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873 (2011); RA Brand and CM Mariottini, 'Note on the concept of "Purposeful and Substantial Connection" in Article 5(1)(g) and 5(1)(n)(ii) of the February 2017 draft Convention', Preliminary Document No. 6 of September 2017 <https://assets.hcch.net/docs/94caa6bc-ca61-45ce-8ddb-8f724174d1b1.pdf> (accessed 29 July 2020).

[18] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* 634 F. Supp. 842 (S.D.N.Y. 1986), *affidavit in part, modified in part*, 809 F.2d 195 (2d Cir. 1987), *certiori denied*, 484 U.S. 871 (1987); M Petsche, 'What's Wrong with Forum Shopping - An Attempt to Identify and Assess the Real Issues of a Controversial Practice' (2011) 45 The International Lawyer 1005, 1022.

[19] Arts 11; 14 Belgian Code of Private International Law (English translation by C Clijmans and P Torremans available at <https://sociedip.files.wordpress.com/2013/12/belgica-the-code-of-private-international-law-2004.pdf> (accessed 29 July 2020); A Nuyts, 'Study on Residual Jurisdiction' (2007) para 93.

[20] RA Brand, 'Comparative Method and International Litigation' [2020] Journal of Dispute Resolution 273, 284.

[21] *Equitas Ltd aor v Wave City Shipping Company Ltd aors* [2005] EWHC 923 (Comm), para 14.

This compulsory deference sometimes leads to disputes being settled by a court that has no connection to the dispute or the defendant.[22] Two examples are illustrative in this respect.

The first illustration is the contract case of *Schmidt v Schmidt*.[23] Here, Mr Schmidt, an Austrian resident, had donated immovable property to his daughter, who was domiciled in Germany. Later, Mr Schmidt's guardian brought an action aimed at obtaining the annulment of the gift, alleging that Mr Schmidt had lacked capacity. The CJEU confirmed that the annulment action could be entertained by the court of the place of performance of the obligation to transfer property (Austria).[24] In this specific case, Austria had a meaningful connection to both the claim and the defendant. Mr Schmidt's capacity likely depended on Austrian law (the 'personal law'), the gift was registered in the Austrian land registry, and Ms Schmidt (although domiciled in Germany) probably had a sufficiently close link to Austria given her family ties.[25] By contrast, it is easy to understand that these connections only existed by chance. If the obligation to transfer the property had been performed in a country where none of the parties were domiciled, for example if the property had been in Slovakia, then the courts of Slovakia would have had a tenuous connection to the dispute and the defendant. The only linkage would have been the registration of the transaction in the Slovakian land registry. The matter of capacity, which was at the heart of the controversy, would have been manifestly more closely connected to Austria. Nevertheless, the Brussels Ia Regulation would not allow the Slovakian courts to refrain from hearing the case in favour of the Austrian courts.

The second example is *Bier v Mines de potasse*, which was a tort case.[26] The Court held that Dutch victims of the pollution of the Rhine River caused by a French company could take proceedings either to the place where the damage occurred (the Netherlands) or where the harmful event occurred (France). Arguably, the courts of these locations were likely to be in a good position to judge in this case.[27] However, the Court has been grappling with locating the place of damage in other contexts in the decades that followed. A telling example are cases of financial loss due to the devaluation of financial instruments. Here, the damage in principle occurs in the victim's bank account, as this is where the financial loss is directly felt.[28] However, in and of itself this location

[22] U Grušić, 'Jurisdiction in Complex Contracts under the Brussels I Regulation' (2011) 7 JPrivIntlL 321, 333; G Tu, 'Finding A Proper Nexus For Constructing Specific (Special) Jurisdiction Regarding Commercial Contract and Tort Cases: A Comparative Study of the Us and European Approaches' (2009) 5 JPrivIntlL 243, 263; J Hill, 'Jurisdiction in Matters Relating to a Contract under the Brussels Convention' (1995) 44 ICLQ 591, 598–599.
[23] Case C-417/15 ECLI:EU:C:2016:881.
[24] ibid
[25] See *McGee v. International Life Insurance Co.* 355 U.S. 220 (1957).
[26] Case C-21/76 ECLI:EU:C:1976:166.
[27] R Brand, 'Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention' (1998) 24 Brooklyn Journal of International Law 7.
[28] M Lehmann, 'Where Does Economic Loss Occur?' (2011) 7 Journal of Private International Law 527, 543–544.

usually is only linked tenuously to the controversy and to the defendant (a bank, asset manager or otherwise). It merely depends on where the claimant-victim chose to open an account. The place of harmful conduct has a much more evident connection to both the dispute (since this is where the financial damage was caused) and the defendant (since this is where the defendant conducted the allegedly wrongful activity).[29] Although the jurisprudence of the Court has been reluctant to clarify the relevance of a bank account as the place of financial damage, it provided that a bank account can only be qualified as the place of damage in special circumstances.[30] What constitutes special circumstances has been left open.[31] It is unsure whether the defendant's connection to the country where the account is could play a meaningful role, although the Advocate General has suggested this path in *VKI v Volkswagen*.[32]

The interim conclusion is that the jurisprudence of the CJEU seems to be inconsiderate of the legislature's aim of granting jurisdiction over contracts and torts to the most appropriately placed forum.

2.2. Appropriateness through Predictability, Defendant Protection, and Context

Against the backdrop of the CJEU's jurisprudence, some have argued that the Brussels Regime accords no weight to the appropriateness of the forum or procedural fairness towards the defendant. They assumed that it is inherently unfair that the Regulation allows a court to entertain a dispute while a more closely connected and hence more appropriate forum is available elsewhere.[33] While this characterisation is pertinent to an extent, there are three reasons why it requires further qualification.

Firstly, the jurisdictional regime of Brussels Ia pursues a different ideal of fairness and appropriateness than e.g. English or American conflict-of-jurisdictions: predictability.[34] It aims at allowing parties to predict with a high degree of certainty where they are able to sue and be pursued.[35] Considerations about the appropriateness of the court to try an individual case have to yield to this aspiration. Therefore, it is said that the Brussels Ia Regulation deploys 'hard-and-fast'[36]

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[29] Tu (n 23) 270.
[30] Case C-12/15 *Universal Music International Holding BV v Michael Tétreault Schilling* ECLI:EU:C:2016:449 paras 36–39; Case C-375/13 *Harald Kolassa v Barclays Bank plc* ECLI:EU:C:2015:37, paras 54–56.
[31] M Lehmann, 'Private International Law and Finance: Nothing Special?' [2018] Nederlands Internationaal Privaatrecht 3, 18.
[32] Case C-343/19 ECLI:EU:C:2020:253, Opinion of AG Sánchez-Bordona.
[33] Hill (n 23) 598–602. See C Forsyth, 'The Eclipse of Private International Law Principle - The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era' (2005) 1 JPrivIntlL 93, 95.
[34] R Michaels, 'Two Paradigms of Jurisdiction' (2006) 27 MichJIntlL 1003.
[35] P Rogerson, *Collier's Conflict of Laws* (Cambridge University Press 2013) 131.
[36] C Kohler, 'Practical Experience of the Brussels Jurisdiction and Judgments Convention in the Six Original Contracting States' (1985) 34 ICLQ 563.

rules of jurisdiction.[37] The CJEU's decision in *VKI v Volkswagen* illustrated this.[38] Here, a group of consumers pursued Volkswagen for damage incurred due to the use of fraudulent software in Volkswagen cars to circumvent emission standards. The CJEU held that the place of damage was where the consumers bought their car. In and of itself (and despite what the Court held),[39] the dispute's link to this location is quite fortuitous and therefore not necessarily close.[40] Moreover, the mere fact that a consumer product is sold through a distribution network in most countries does not necessarily mean that a manufacturer directed activities to those countries and therefore has a sufficiently close connection to these countries.[41] Nonetheless, the Court was mainly guided by predictability, and not as much by the closeness of connection between the forum state and the controversy/the defendant. It observed that a car manufacturer like Volkswagen who had lied about the characteristics of the cars it sold could reasonably foresee being sued in the place where consumers bought the cars.[42] The decision demonstrated that the Brussels Ia Regulation allows claimants to choose where to pursue the defendant, within the limits of predictability.[43]

Secondly, the jurisprudence of the CJEU does not tolerate manifest unfairness in the operation of the Brussels Ia Regulation.[44] The intolerance is born out of the concern to protect defendants, not out of appropriateness considerations. The decision in *Kronhofer v Marianne Maier* illustrated this.[45] Here, the CJEU held that the tort jurisdiction does not give jurisdiction to the court of the place where indirect damage occurred. In this case, the indirect damage was the devaluation of an investor's assets (located in his domicile in Austria) due to a direct financial loss incurred on a German account. The Court observed that allowing the court of the place of the indirect damage to take jurisdiction would 'not meet any objective need as regards evidence or the conduct of the proceedings'.[46] However, this decision was reached mainly on other grounds than the need for a connection between forum and controversy/defendant. It was centred on the central place of the defendant's home advantage in the Brussels Ia Regulation. In light of this foundational principle, the place of damage was interpreted narrowly in order to avoid that claimants could rely

[37] Also see *Custom Made Commercial* (n 8), para 15.
[38] Case C-343/19 ECLI:EU:C:2020:534.
[39] ibid, para 38.
[40] M Lehmann, 'Where Did Economic Loss Occur in the VW Emissions Case?' (https://eapil.org/2020/04/17/where-did-economic-loss-occur-in-the-vw-emissions-case/) accessed 16 July 2020. See (n 32), para 77.
[41] *Nicastro* (n 17); *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 111, 112, (1987) (O'Connor, J.).
[42] (n 38), para 37. The Advocate General opined in a similar vein: (n 32), paras 77–80.
[43] Explicitly confirmed by the Advocate General in *VKI v Volkswagen* (n 32), para 62.
[44] Michaels (n 35) 1050.
[45] Case C-168/02 *Rudolf Kronhofer v Marianne Maier* ECLI:EU:C:2004:364.
[46] ibid, para 18.

on the tort jurisdiction too easily to take defendants to other courts than those of their domicile.[47] The emphasis on the protection of the defendant is another element of fairness in the context of the Brussels Ia Regulation, in addition to predictability.

Thirdly and finally, the Brussels Ia Regulation is embedded in a distinctively civil context.[48] The original contracting states to the 1968 Brussels Convention were civil law countries[49] and the negotiators were hence all versed in civil legal systems, which generally place a high stake on legal certainty in the form of rigid (statutory) rules. The Brussels I Regulation still confirms the chief aim of establishing clear, detailed, uniform rules of jurisdiction.[50] The Brussels Ia Regulation was only confronted with the (often-diverging)[51] common law approach to conflict-of-jurisdictions after the accession of the UK and Ireland to the European Communities in 1973. This confrontation often pertained to the interface between the Brussels Ia Regulation and common law concepts (such as anti-suit injunctions or freezing orders), but has not so much affected the system that lays at the basis of the Regulation. Given the civil law heritage of the rules of jurisdiction contained in the Brussels Ia Regulation, it is easy to understand why the specific jurisdictions over contracts and torts yield to considerations of predictability.

The conclusion can therefore be drawn that the specific jurisdiction featuring in the Brussels Ia Regulation is not dead. It pursues its own ideal of fairness, which is formalistic, centred on the protection of defendants, and instrumental. Where does this leave the Brussels Ia Regulation from a global perspective?

3. The Globalising Context of Recognition and Enforcement

It has been argued that the European private international law scholarship has become increasingly inward looking,[52] in part because of the breadth of issues regulated and the positive practical experience.[53] Unsurprisingly, European conflict-of-jurisdictions is sometimes seen as a model for unification on a global scale. However, recent advancements in the field of the global unification of R&E have demonstrated that the Brussels Ia Regulation's relevance is limited on the global

[47] ibid, para 13. Similarly Case C-27/17 *AB 'flyLAL-Lithunian Airlines' v Starptautiskā lidosta 'Rīga' VAS and 'Air Baltic Corporation' AS* ECLI:EU:C:2018:136, para 99.
[48] See Harris (n 15) 352.
[49] Belgium, France, Germany, Italy, Luxembourg, the Netherlands.
[50] Rec 15 Brussels Ia.
[51] B Hess, 'The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit' (2018) 6.
[52] G Rühl, 'Who's Afraid of Comparative Law? The (Side) Effects of Unification of Private International Law in Europe' [2017] European Review of Private Law 485, para 22.
[53] M Poesen, 'Civil and Commercial Private International Law in Times of Brexit: Managing the Impact, and Fostering Prospects for a Future EU-UK Cooperation' in M Sacco (ed), *Brexit: a way forward* (Vernon Press 2019) 286.

scene. We will discuss that the Judgments Convention, which sets out to bringing about a global R&E standard, highlights the particularity of the European approach to specific jurisdiction.

The Judgments Convention is perhaps atypical for this time of decaying multilateralism. It aims to stimulate international trade and commerce by facilitating the R&E of judgments on a global scale.[54] In contrast to the Brussels Ia Regulation, the Judgments Convention does not contain grounds of jurisdiction to determine which court has jurisdiction to hear a case.[55] Instead, it provides a list of 'jurisdictional filters'. If a judgment was handed down by a court of origin that had jurisdiction according to one of the filters contained in this list, the contracting states to the Judgments Convention are under the obligation to allow the R&E of said judgment safe for a number of exceptions.[56] Among the elaborate list of jurisdictional filters feature provisions for judgments on contractual and non-contractual obligations. Both filters disfavour the R&E of judgments whose jurisdictional basis was founded on rigid rules of jurisdiction, as will be discussed below.

The Convention contains a jurisdictional filter for judgments on contractual obligations that exists of two legs, which combine the civil and (US) common law viewpoint on specific jurisdiction.[57] The first leg provides that only judgments originating from the place of performance of the obligation in question[58] can be recognised and enforced. This is reminiscent of the European 'hard-an-fast' approach. Unless the place of performance is agreed on by the parties, it is determined in accordance with the applicable law.[59] Of course, many contracts contain an agreement on the place of performance.[60] The Convention does not clarify, however, whether parties can agree on a place of performance that has no meaningful link to the actual place of performance.[61] It seems that this is possible, subject to the second leg. The second leg of the contract filter provides that judgments originating from the place of performance cannot be recognised and enforced if 'the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State'. This qualification is informed by the US Due Process approach to taking jurisdiction, according to which a court can only assume

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[54] RA Brand, 'Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead' (2020) 67 Netherlands International Law Review 3, 4.
[55] A global harmonisation of jurisdictional bases turned out not to be acceptable to i.a. the US: H van Loon, 'The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' [2020] Nederlands Internationaal Privaatrecht 9.
[56] See i.a. Art 7 Judgments Convention.
[57] Art 5(1)(i) Judgments Convention.
[58] Which is probably to be understood as the obligation on which an action is based: Case C-14/76 *A. De Bloos, SPRL v Société en commandite par actions Bouyer* ECLI:EU:C:1976:134, para 15.
[59] This solution is identical to the one applicable under Art 7(1)(a) Brussels Ia: Case C-12/76 *Industrie Tessili Italiana Como v Dunlop AG* ECLI:EU:C:1976:133, para 13.
[60] PA Nielsen, 'The Hague 2019 Judgments Convention - from Failure to Success?' (2020) 0 Journal of Private International Law 1, 15.
[61] See Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* EU:C:1997:70, para 33.

jurisdiction over a defendant if the latter has a meaningful linkage (or 'minimum contacts') to the forum.[62] It is aimed at avoiding 'jurisdiction-establishing geographical links that are arbitrary, random or insufficiently related to the transaction between the parties'.[63] This second leg expresses a degree of scepticism towards the civil law deference to the appropriateness of the forum vis-à-vis the defendant. In this respect, Hans Van Loon observed that it 'implies a limitation of the Brussels/Lugano approach'.[64] For example, there would be no purposeful and substantial connection between the defendant and the forum in the contract case of *Schmidt v Schmidt*, which was discussed above (section 2.1.). At the same time, of course, the second leg is liable to creating legal uncertainty.[65] But this apparently was considered to be a trade-off worth making to achieve a balance between the European and American approach to jurisdiction in contractual matters.

Equally important, the Convention contains a jurisdictional filter for judgments on non-contractual obligations.[66] This filter is subject to two qualifications. First, it provides for the R&E of judgments originating from the place of harmful conduct. This location is widely recognised as an appropriate connecting factor in tort matters.[67] In contrast to the European rule of tort jurisdiction, judgments originating from the court of the place of damage are not included in the jurisdictional filter. It was explicitly aimed at avoiding 'interpretive difficulties'.[68] On the one hand, this exclusion recognises that the defendant or the controversy often do not have a connection to the place of damage, which makes the forum of this place less likely to be an appropriate one in terms of fairness towards the defendant.[69] On the other hand, the undesirable side-effect may be that the access to justice of victims of torts is not facilitated (such as victims of environmental torts who may benefit from taking to the court of the place of damage).[70] The drafters of the Judgments

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[62] *Nicastro* (n 17); Nielsen (n 61) 15; M Wilderspin and L Vysoka, 'The 2019 Hague Judgments Convention through European Lenses' [2020] Nederlands Internationaal Privaatrecht 34, 42–43.
[63] F Garcimartín and G Saumier, 'Judgments Convention: Revised Draft Explanatory Report', Preliminary Document No 1 of December 2018, para XXX <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf>.
[64] van Loon (n 56) 13.
[65] International Bar Association (IBA), 'Report to the HCCH Special Commission on the Recognition and Enforcement of Foreign Judgments', Information Document No 8 of February 2017, 27–28 <https://assets.hcch.net/docs/03311845-08cd-4048-953b-285914e44e25.pdf> (accessed 29 July 2020); ibid; A Bonomi and CM Mariottini, 'Breaking News from The Hague - A Game Changer in International Litigation? Roadmap to the 2019 Hague Judgments Convention' in A Bonomi (ed), *Yearbook of Private International Law*, vol 20 (Otto Schmidt 2019) 557.
[66] Art 5(1)(j).
[67] Bonomi and Mariottini (n 66) 558.
[68] Draft Explanatory Report 2018 (n 63), para 204
[69] *Walden v. Fiore* 134 S. Ct. 1115 (2014); van Loon (n 56) 12–13; Wilderspin and Vysoka (n 63) 43. See H Schack, 'Wiedergänger Der Haager Konferenz Für IPR: Neue Perspektiven Eines Weltweiten Anerkennungs-Und Vollstreckungsübereinkommem?' [2014] Zeitschrift für europäisches Privatrecht 825, 838.
[70] H Van Loon, 'Principles and Building Blocks for a Global Legal Framework for Transnational Civil Litigation in Environmental Matters' (2018) 23 Uniform Law Review 298, 315.

Convention struck a different balance of interests, however.[71] Second, the tort filter only facilitates the R&E of judgments concerning physical injury. It 'will not apply where the claim is based on losses that are not connected to a *physical injury* or to *damage to tangible property*'.[72] This exclusion 'was intended to prevent [the jurisdictional filter] from operating in more controversial areas of non-contractual obligation, and thus to enable broad acceptance of this provision'.[73] It bars the R&E of judgments originating from courts whose jurisdiction was based on the occurrence of an event causing financial loss. Consequently, the tort filter is less likely to play an important role in commercial tort litigation, since such disputes often turn on economic and financial loss and not on physical or material injury.

It has become clear that the Judgments Convention is weary of allowing the R&E of judgments concerning contracts and torts originating from a court that had no linkage to the defendant. But in principle, the Judgments Convention does not fetter the mechanisms used to allocate jurisdiction in the law of the ratifying states. It only pertains to the conditions for R&E of judgments. Nonetheless, the Judgments Convention expresses a value judgment on contract and tort jurisdiction by setting out the jurisdictional bases that ensue the R&E under the Judgments Convention. From this perspective, the contracts and torts jurisdictional filters indicate that European style rules are not at all the globally accepted model they are sometimes believed to be.[74] To the contrary, the Judgments Convention is indicative of a preference for jurisdictional rules on contract and tort disputes that take into account the connection between the defendant and the forum. Quite evidently, this is the upshot of a compromise struck mainly between the US and EU negotiators, and part of a bid to make the Judgments Convention as attractive as possible to ensure ratification by a broad array of states.[75] More interestingly, the Judgments Convention might be indicative of a trend at large. Its jurisdictional filters for contracts and torts might give an insight into how the work of a convention concerning jurisdiction, currently ongoing at the HCCH as the 'Jurisdiction Project',[76] may turn out for specific jurisdictions in contractual and non-contractual matters. The Jurisdiction Project aims at drafting a convention on direct jurisdiction,[77] which

[71] Initially, the place of damage was considered as a possible jurisdictional filter: Preliminary Document No 2 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments, fn 57 <https://assets.hcch.net/docs/e402cc72-19ed-4095-b004-ac47742dbc41.pdf> (accessed 29 July 2020).
[72] Draft Explanatory Report 2018 (n 63), para 203 (emphasis added).
[73] Preliminary Document (n 71), para 100.
[74] van Loon (n 56) 13.
[75] Wilderspin and Vysoka (n 63) 43–44.
[76] <https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project> (accessed 29 July 2020).
[77] <https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project> (accessed 20 August 2020).
The Project revives the previous attempts at bringing about such a convention: P Beaumont, 'Forum Non Conveniens and the EU Rules on Conflicts of Jurisdiction: A Possible Global Solution' [2018] Revue critique de droit international privé 447, s II.

complements the Judgments Convention's R&E framework. Flexible mechanisms that allow courts a certain degree of discretion when taking jurisdiction, such as minimum contacts or forum non conveniens,[78] might eventually become part and parcel of this new, emerging global jurisdiction framework.[79] The inclusion of such mechanisms will undoubtedly be on the Jurisdiction Project's agenda, especially since the third large block at the HCCH negotiating table–China–has implemented a forum non conveniens test in its civil procedure.[80] If anything, the Judgments Convention has demonstrated that the EU approach to specific jurisdiction is just one of many viable approaches to allocating jurisdiction over contract and tort disputes.

4. Conclusion

Two main conclusions can be drawn. The first one concerns the rigid allocation of special jurisdiction over contracts and torts under the Brussels Ia Regulation. This rigidity can be explained by the aim to achieve predictability. Considerations concerning the linkage between a dispute and the forum, or between the defendant and the forum, which in other legal systems are considered as indispensable to safeguard fairness, have to yield to this aim. Enabling parties to predict where they can sue and be pursued through rigid, inflexible rules is the Brussels Ia Regulation's own way of ensuring that the allocation of jurisdiction is fair. Moreover, the jurisprudence concerning the Regulation has shown the CJEU's willingness to rectify manifestly unfair outcomes produced by the Regulation's rigid rules of jurisdiction over contracts and torts.

The second conclusion relates to the global context within which the Brussels Ia Regulation exists. Whereas the Brussels Ia Regulation's viewpoint on special jurisdiction over contracts and torts can be rationalised from a European perspective, it does not seem to hold sway on the global scene. The 2019 HCCH Judgments Convention is critical towards the recognition and enforcement of judgment handed down by courts that assumed jurisdiction under rigid, inflexible rules of contract and tort jurisdiction that are blind for the connection between the defendant and the forum. Although the Judgments Convention does not deal with jurisdiction directly, it is indicative of the global weariness towards European style rules of contract and tort jurisdiction.

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[78] In the law on R&E, forum non conveniens plays a weaker role, which explains why its application is excluded in the R&E phase by the Judgments Convention: Art 13(2) Judgments Convention; 'Research Paper on Personal Jurisdiction and Forum Non Conveniens in the Enforcement Context', 17 <https://assets.hcch.net/docs/2052902c-f23f-4e3d-8a64-6ecea62a3249.pdf> (accessed 29 July 2020).

[79] Beaumont (n 78) s II.

Negotiators will have to face concerns that the forum non conveniens mechanism unduly burdens the access to justice of certain types of litigants, such as environmental tort victim: N Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 Journal of Business Ethics 493, 509.

[80] (n 15).